

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KERRY and MICHAEL WASHBURN,

Plaintiffs,

v.

GYMBOREE RETAIL STORES, INC., *et al.*,

Defendants.

Case No. C11-822RSL

ORDER GRANTING IN PART  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

This matter comes before the Court on Defendants' motion for summary judgment (Dkt. # 52). For the reasons set forth below, the Court GRANTS the motion IN PART.<sup>1</sup>

**I. BACKGROUND**

Ms. Washburn was hired by Defendant Fran Anyan in April 2008 to work as an entry level sales associate at Defendant Gymboree Retail Stores' South Hill Mall location. See Dkt. # 68 at ¶ 5. Six months later, she was promoted to assistant manager at that store. Id. The position required her to work around 20 hours per week with open availability. Dkt. # 69-2 at 8. In April 2009, Ms. Washburn was asked to transfer to a new location at the Tacoma Square Mall. Dkt. # 68 at ¶ 5. She agreed, as did Ms. Anyan, who became the manager, and another employee, Defendant Angie Cochenour,

<sup>1</sup> The Court also GRANTS Plaintiffs' unopposed "Motion to Accept Filing" (Dkt. # 72).

1 who was promoted to sales lead. Id. As she later explained, she wanted to continue  
2 working with Ms. Anyan and Ms. Cochenour. See Dkt. # 69-2 at 9. She considered  
3 them a “close-nit” team, id. at 11, of “working friends,” Dkt. # 68 at ¶ 22.

4 In March 2009, Ms. Washburn was diagnosed with multiple sclerosis. Dkt. # 68  
5 at ¶ 6. Shortly thereafter, she told Ms. Anyan of her condition, id. at ¶ 8, and let her  
6 know that she would need to take time off and wanted to “process an FMLA claim,” id.  
7 at ¶ 15. According to Ms. Washburn, rather than processing her claim, “Ms. Anyan  
8 indicated I did not need FMLA benefits because she would give me any time off I  
9 needed.”<sup>2</sup> Id. at ¶ 9. Ms. Washburn concedes that she kept that alleged promise. Dkt. #  
10 69-2 at 24 (“They did not deny me [any leave] I requested off.”). On or about March 19,  
11 2009, Ms. Washburn asked for time off because of her condition. Dkt. # 68 at ¶ 15. Ms.  
12 Anyan allowed her all the time she requested. Id. In June and September, Ms.  
13 Washburn requested time off to care for her daughter. Id. at ¶ 17. Again, her request  
14 was granted. Id. at ¶ 17. On or about October 16, she requested time off and, for the  
15 first time, provided a doctor’s note. See id. at ¶ 20; Dkt. # 69-22 at 1 (the note). Ms.  
16 Anyan gave her the time. Dkt. # 68 at ¶ 20. On October 27, she requested several weeks  
17 off and provided another note. Id. at ¶ 24; Dkt. # 69-22 at 2 (the note). Again, her  
18 request was granted.<sup>3</sup> Dkt. # 68 at ¶ 24. On December 17, she asked for an additional

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19 <sup>2</sup> Ms. Anyan disputes Ms. Washburn’s recollection of much of the substance of her  
20 claims. For example, Ms. Anyan states that, after Ms. Washburn told her of her condition, she  
21 told Ms. Washburn of her FMLA rights, showed her in the employee handbook where those  
22 rights were outlined, provided her with the contact information for Gymboree’s benefits  
23 department, and directed her to call corporate if she wanted to take advantage of those rights.  
24 See Dkt. # 69-5 at 13–14. For present purposes, however, the Court “must draw all reasonable  
25 inferences in favor of the nonmoving party, and it may not make credibility determinations or  
26 weigh the evidence.” Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 150 (2000). The  
Court therefore relies on Ms. Washburn’s account.

<sup>3</sup> According to Ms. Washburn, she nevertheless asked Ms. Anyan if she could attend an  
October 28 store meeting. Dkt. # 68 at ¶ 26. She also asked Ms. Anyan if she could drive her

1 two weeks off, supported by a note, Dkt. # 69-22 at 4, and informed Ms. Anyan that she  
2 might need additional time. Dkt. # 68 at ¶¶ 40–41. Again, she received all the time she  
3 requested. See id. at ¶ 44.

4 On December 28, Ms. Washburn called Ms. Anyan to let her know that she had  
5 another doctor's appointment scheduled for January 6, 2010. Id. at ¶ 46. The Court  
6 infers from Ms. Washburn's declaration that she told Ms. Anyan during that phone call  
7 that she would not be returning to work prior to her appointment. Id. at ¶ 45. Afterward,  
8 Ms. Washburn received a voice mail from April Macdonald, who worked in Gymboree's  
9 benefits department, stating that she wished to talk to Ms. Washburn about her FMLA  
10 rights. See id. at ¶ 46. According to Ms. Washburn, Ms. Anyan later told her that she  
11 had called the benefits department to inform them of Ms. Washburn's situation. Id. at  
12 ¶ 47. After exchanging several letters and missed calls,<sup>4</sup> Ms. Washburn faxed Ms.  
13 Macdonald a doctor's note on January 8 to support her request for FMLA leave. Id. at ¶  
14 52. The note specified that she needed a minimum of two weeks off. Dkt. # 69-22 at 5.  
15 Ms. Macdonald responded the same day, informing Ms. Washburn via a faxed letter that  
16 Gymboree had approved her request for FMLA leave. Dkt. # 68 at ¶ 53; Dkt. # 69-26  
17 (approval letter). That letter stated clearly that leave had been approved through January  
18 20 but that Ms. Washburn could extend her leave through March 10, 2010, with proper  
19 documentation. Dkt. # 69-26 at 1. It further noted that Ms. Washburn would not be  
20 permitted to return to work without a note from her health care provider. Id.

21 In the weeks that followed, Ms. Washburn submitted several notes to support  
22 requests for extensions of her leave. See Dkt. # 69-22 at 6–7. The last of these was

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23 home after the meeting. Id. Ms. Anyan agreed to both requests. See id. at ¶ 27.

24 <sup>4</sup> The Court notes that Ms. Washburn believes that the letters requesting verification of  
25 her condition and need for time off were themselves offensive. Dkt. # 68 at ¶¶ 48–52.

1 dated January 29, 2010. Id. at 7. It justified an extension through February 12, 2010.  
2 Id. at 7; see Dkt. # 69-26 at 9.

3 In the meantime, Ms. Washburn contacted corporate about another issue: her  
4 request that Gymboree “put an end to the poor treatment and retaliation [she was]  
5 experiencing from [Ms. Anyan] and [Ms. Cochenour].” Dkt. # 69-23 at 2. In a letter  
6 sent in early February 2010, Ms. Washburn outlined to Defendant Lana Rackley, her  
7 district manager, the mistreatment she allegedly endured after she began requesting time  
8 off: being asked by Ms. Anyan to step down as an assistant manager, being glared at by  
9 Ms. Cochenour, and having a file cabinet door slammed shut in her presence. Id.

10 After receiving the letter, Ms. Rackley called Ms. Washburn. Dkt. # 68 at ¶ 59.  
11 During the call, Ms. Washburn further detailed her alleged mistreatment. Though she  
12 conceded that no one ever called her names or taunted her for having MS, she explained  
13 that, beginning in October, Ms. Washburn “noticed a very real change in how both  
14 Anyan and Cochenour treated [her]”—that “what was once a cordial and friendly  
15 relationship” had become “an icy and at times overtly hostile relationship.” Id. at ¶ 22.  
16 She gave the following examples: “they complained outwardly . . . about what they felt  
17 was ‘extra’ work they had to do because I was off”; they no longer included her in their  
18 personal conversations; and they “did everything possible to avoid [her,] including  
19 leaving the back office when I would walk in, walk away from the front desk when I  
20 would walk up, etc.” Id.

21 She also told Ms. Rackley that Ms. Anyan had repeatedly urged her to step down  
22 from her position, telling her that “she didn’t want to lose me as a manager, and that I  
23 was a rock,” but that she and Ms. Rackley “felt that I would need to step down.”<sup>5</sup> E.g.,

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24 <sup>5</sup> Ms. Washburn concedes that she was the first to bring up the idea of her stepping down  
25 to a sales position. Dkt. # 69-26 at 16. She also concedes that she had told at least one of her  
26 treating physicians in November 2009 that she was planning to quit her job by the end of the

1 Dkt. # 69-26 at 15. She says she told Ms. Rackley that Ms. Anyan had told her on  
2 several occasions that her taking time off “makes her team weak and she has to do what  
3 is right for the store and the company”—urge Ms. Washburn to accept a demotion to  
4 sales lead. Dkt. # 68 at ¶¶ 28, 31.

5 Ms. Washburn told Ms. Rackley that this treatment continued into November and  
6 December—that Ms. Anyan and Ms. Cochenour “were constantly complaining about  
7 having to do the extra work I did, such as dust the store . . . and cash register audits,”  
8 ignoring her, or treating her rudely. Id. at ¶ 38. She also complained that when she  
9 would return to work from her medical leaves, she would find “various things in disarray  
10 that were not being done in [her] absence, dusting and financial paperwork were only a  
11 few examples.” Id. And, she explained how things really “came to a head” in mid-  
12 December. Id. at ¶ 39. She recounted how, when she came to the store to return a key  
13 on December 17, Ms. Cochenour gave her a “‘if looks could kill’ dirty look” before  
14 going into the back office. Id. at ¶ 40. And later, when she told Ms. Anyan that she  
15 needed at least two week off, Ms. Cochenour slammed shut the drawer in a large metal  
16 filing cabinet where employees kept their purses and gave her another dirty look. Id. at  
17 ¶ 41. She told Ms. Rackley that when she highlighted this behavior to Ms. Anyan, Ms.  
18 Anyan told her that “the two of you are adults, and you can deal with it.” Id. at ¶ 42.

19 Accordingly to Ms. Washburn, she was “dismayed” by Ms. Rackley’s response to  
20 this description of her treatment. Rather than agreeing to look into these “issues,” Ms.  
21 Rackley told her that it would only make things “more difficult when [she] returned.”  
22 Id. at ¶ 60. Nevertheless, she concedes that, at the time, she agreed to wait to “see what  
23 happened when [she] went back and would call [Ms. Rackley] if things continued.” Id.  
24 She says she also made clear, though, that she “wanted the harassment to stop.” Id.

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25 year to spend more time with her family. Dkt. # 69-2 at 31.

1 The parties did not communicate again until February 23, 2010, when Ms.  
2 Macdonald sent Ms. Washburn a letter informing her that her authorized leave had  
3 expired on February 12 and directing her to contact her store manager immediately to  
4 arrange her return date. Dkt. # 69-26 at 9. The letter stated that Gymboree would  
5 assume she had decided not to return if it did not hear from her within three business  
6 days. Id. Ms. Washburn immediately phoned Ms. Macdonald to ask her what she  
7 needed to do to continue her leave. Dkt. # 68 at ¶ 63. She was unable to reach her but  
8 left a message, stating that her doctors “were recommending that [she] not yet return to  
9 work” and that she was “considering asking to be transferred from the Tacoma Mall  
10 store because things were clearly not getting any better.” Id. The two exchanged  
11 messages for a few weeks but never reached each other. Id.

12 On March 10, Ms. Washburn left Ms. Macdonald another message, stating that  
13 her “doctors would not release her to work at the Tacoma Mall store but that they would  
14 provide a written release to work at a different store.” Id. at ¶ 64 (emphasis omitted).  
15 On March 29, Ms. Washburn and Ms. Macdonald finally spoke. Id. at ¶ 66. Ms.  
16 Washburn told her that “her . . . health care providers would not let [her] return to the  
17 Tacoma Mall store but that they would allow [her] to work at a different store,” id. at  
18 ¶ 67—a possibility she was interested in, even if it meant accepting a demotion to sales  
19 associate. Dkt. # 69-24; Dkt. # 68 at ¶ 71. Ms. Macdonald told her to contact Jim  
20 Shanahan at corporate about her complaints and about transferring. Dkt. # 68 at ¶¶  
21 68–71. Ms. Washburn did, describing her circumstances to him. Id. at ¶ 68. According  
22 to Ms. Washburn, he “did not care” about her complaints; he only wanted to talk about  
23 her request to transfer. Id. at ¶ 69.

24 Two days after she spoke with Mr. Shanahan, Ms. Washburn received a phone  
25 call from Ms. Rackley. See id. at ¶ 72. In it, she relayed that she had spoken with Mr.  
26 Shanahan and understood that Ms. Washburn was “not planning on returning to the

1 Tacoma store”—a decision she “completely respect[ed] and underst[oo]d.” Id. at ¶ 73.  
2 She asked Ms. Washburn to give her a call and let her know “what locations [she] would  
3 be interested in at working at other than the Tacoma store and what positions [she was]  
4 interested in” so that she could “go down there and find out what” was available. Id.

5 Ms. Washburn followed up with Ms. Rackley, telling her that she would prefer to  
6 transfer to either “the South Hill Mall store where [she] started or the store at the  
7 Supermall in Auburn.”<sup>6</sup> Id. at ¶ 71; Dkt. # 69-22 at 23. A week later, Ms. Rackley  
8 called again and left a voicemail informing her that nothing was available. Dkt. # 68 at ¶  
9 74. She told her that Gymboree was going to go ahead and process her resignation but  
10 that “if there is another location that you decide you would be comfortable working at”  
11 or “if anything comes open over in [S]outh [H]ill certainly we would love to get you[]  
12 back on board.” Id. Ms. Washburn did not return her call. On May 6, Ms. Washburn  
13 received a letter from Ms. Macdonald stating that Gymboree had processed her  
14 resignation effective March 29, 2010. Id. at ¶¶ 76–77.

15 Ms. Washburn responded by filing a complaint with Washington’s Human Rights  
16 Commission. Id. at ¶ 78. After the Commission dismissed her complaint, she filed suit  
17 against Defendants Gymboree and Ms. Anyan in King County Superior Court. Dkt. # 1  
18 at 7. Defendants promptly removed the action to this Court. Id. at 1–4. Plaintiffs later  
19 filed an amended complaint, asserting claims against Gymboree, Ms. Anyan, and Ms.  
20 Rackley. Dkt. # 42. Specifically, Ms. Washburn alleges that each Defendant violated  
21 her rights under the Family Medical Leave Act (“FMLA”), 29 U.S.C. § 2601, *et. seq.*,  
22 the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12111, *et. seq.*, and

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23 <sup>6</sup> The Court notes that Ms. Washburn also suggests that she informed Ms. Rackley that  
24 she was willing to transfer “anywhere”—an assertion she did not make at her deposition. See  
25 Dkt. # 69-22 at 4 (“And I did return the call and I told her that I would like to go to the South  
26 Hill store and also the SuperMall.”). For present purposes, however, the Court must credit that  
assertion. See Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266–67 (9th Cir. 1991).



1 Washington's state law counterparts, RCW 49.60, *et. seq.*, and RCW 49.78, *et. seq.* She  
2 further alleges that each are liable to her for willful failure to pay wages, and that Ms.  
3 Rackley and Gymboree are liable for defamation and/or portraying her in a false light.

## 4 II. DISCUSSION

5 The Court can enter judgment as a matter of law only if it is satisfied that there is  
6 no genuine issue of material fact. Fed. R. Civ. P. 56(c). The moving party as to each  
7 issue bears the initial burden of informing the Court of the basis for summary judgment.  
8 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It must prove each and every  
9 element of its claims or defenses such that "no reasonable jury could find otherwise."  
10 Eli Lilly & Co. v. Barr Labs., Inc., 251 F.3d 955, 962 (Fed. Cir. 2001). In doing so, it is  
11 entitled to rely on nothing more than the pleading themselves. Celotex, 477 U.S. at  
12 322–24. Only once the moving party makes that initial showing does the burden shift to  
13 the nonmoving party to show by affidavits, depositions, answers to interrogatories,  
14 admissions, or other evidence that summary judgment is not warranted because a  
15 genuine issue of material fact exists. Id. at 324.

16 Notably, to be material, the fact must be one that bears on the outcome of the  
17 case. A genuine issue exists only if the evidence is such that a reasonable trier of fact  
18 could resolve the dispute in favor of the nonmoving party. Anderson v. Liberty Lobby,  
19 Inc., 477 U.S. 242, 249 (1986). "If the evidence is merely colorable . . . or is not  
20 significantly probative . . . summary judgment may be granted." Id. at 249–50. In  
21 reviewing the evidence "the court must draw all reasonable inferences in favor of the  
22 nonmoving party, and it may not make credibility determinations or weigh the  
23 evidence." Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 150 (2000).

24 With these standards in mind, the Court turns to each of Plaintiffs' claims.

### 25 A. Family and Medical Leave Act

26 "The FMLA creates two interrelated substantive rights for [covered] employees."



1 Xin Liu v. Amway Corp., 347 F.3d 1125, 1132 (9th Cir. 2003); see Bachelder v. Am. W.  
2 Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001) (describing the requirements of a  
3 “covered employee”). “First, an employee has the right to take up to twelve weeks of  
4 leave” “for personal medical reasons, to care for their newborn babies, or to care for  
5 family members with serious illnesses.” Liu, 347 F.3d at 1132 (citing 29 U.S.C. §  
6 2612(a)). “Second, an employee who takes FMLA leave has the right to be restored to  
7 his or her original position<sup>7</sup> or to a position equivalent in benefits, pay, and conditions of  
8 employment upon return from leave.” 29 U.S.C. § 2614(a).

9 To protect these rights, the FMLA makes it “unlawful for any employer to  
10 interfere with, restrain, or deny the exercise of or the attempt to exercise” them. 29  
11 U.S.C. § 2615(a)(1). The Department of Labor has interpreted this provision to preclude  
12 “not only refusing to authorize FMLA leave, but discouraging an employee from using  
13 such leave.” 29 C.F.R. § 825.220(b); accord Liu, 347 F.3d at 1133 (approving of that  
14 interpretation). The FMLA also states that it is “unlawful for any employer to discharge  
15 or in any other manner discriminate against any individual for opposing any practice  
16 made unlawful by this subchapter.” § 2615(a)(2); Sanders v. City of Newport, 657 F.3d  
17 772, 777 (9th Cir. 2011) (noting that “a violation of this section is known as a  
18 ‘discrimination’ or ‘retaliation’ claim”). Notably, though, and this is particularly  
19 relevant in this case, the Ninth Circuit has explained that, “[b]y their plain meaning, the  
20 anti-retaliation or anti-discrimination provisions [of § 2615(a)(2) and (b)] do not cover  
21 visiting negative consequences on an employee simply because he has used FMLA  
22 leave.” Bachelder, 259 F.3d at 1124. “Such action is, instead, covered under

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23 <sup>7</sup> “The FMLA does not entitle the employee to any rights, benefits, or positions they  
24 would not have been entitled to had they not taken leave.” Xin Liu, 347 F.3d at 1132 (citing 29  
25 U.S.C. § 2614(a)(3)(B)). “It simply guarantees that an employee’s taking leave will not result in  
26 a loss of job security or in other adverse employment actions.” Id.

1 § 2615(a)(1)” as an interference claim. Id.; accord Liu, 347 F.3d at 1133 n.7.

2 Having identified the law, the Court moves to the facts. Ms. Washburn alleges  
3 that Defendants violated her FMLA rights in a variety of ways: that “Defendants failed  
4 to provide plaintiff proper notice of her FMLA rights, failed to investigate or enter the  
5 collaborative process to determine what amount of time plaintiff needed for FMLA  
6 leave, failed to allow or provide her leave when requested, retaliated against her when  
7 she requested her FMLA rights, and failed to return her job to her when she returned  
8 from leave.” Dkt. # 42 at ¶ 3.4. In their motion, Defendants do not deny that Ms.  
9 Washburn was a covered employee and do not meaningfully contest that they were  
10 “employers” for purposes of the FMLA.<sup>8</sup> See Dkt. # 52 at 23. They do, however, deny  
11 that they violated the Act or its implementing regulations and also argue that summary  
12 judgment is appropriate regardless because Ms. Washburn cannot demonstrate that she  
13 suffered any harm as a result. The Court does not entirely agree.

14 First, the Court notes that, while not without a certain innate appeal, Defendants’  
15 broad argument regarding Ms. Washburn’s lack of “harm” is not convincing. While the  
16 Supreme Court has not definitively answered the question of whether damages are  
17 necessary to establish a prima facie interference claim, see Ragsdale v. Wolverine World  
18 Wide, Inc., 535 U.S. 81, 88 (2002), the Ninth Circuit has squarely held that they are not.  
19 Liu, 347 F.3d at 1135; see Sanders, 657 F.3d at 778 (holding that an “employee must  
20 establish that: (1) he was eligible for the FMLA’s protections, (2) his employer was  
21 covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided  
22 sufficient notice of his intent to take leave, and (5) his employer denied him FMLA  
23 benefits to which he was entitled” to demonstrate a “prima facie case” of a failure to

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24 <sup>8</sup> The FMLA defines “employer” as “any person who acts, directly or indirectly, in the  
25 interest of an employer to any of the employees of such employer.” 29 U.S.C. §  
26 2611(4)(A)(ii)(I).

1 reinstate interference claim). The harm is the deprivation of the substantive statutory  
2 right. Liu, 347 F.3d at 1135.

3 Liu is directly on point. In that case, the Ninth Circuit reversed the district court  
4 for doing precisely what Defendants urge here—granting summary judgment to the  
5 employer because, regardless of its mischaracterization of “FMLA qualifying leave . . .  
6 as personal leave,” the plaintiff received all the leave she was entitled to and “there was  
7 [thus] no practical distinction between the personal leave she was granted and the FMLA  
8 leave to which she was entitled.” Liu, 347 F.3d at 1135. In its decision, the Ninth  
9 Circuit made clear that an interference claim is actionable so long as there exists a triable  
10 issue of fact as to whether the employer “denied [its employee] a substantive right under  
11 FMLA.” Id. Whether damages could ultimately be proven and recovered was  
12 immaterial—a conclusion that both binds the Court and precludes it from broadly  
13 dismissing Ms. Washburn’s FMLA claim for want of damages.<sup>9</sup>

14 The Court thus moves to Defendants’ second argument—that there does not exist  
15 a triable issue of fact as to each of Ms. Washburn’s alleged interference claims and that  
16 judgment in their favor is appropriate as a matter of law. Again, the Court largely  
17 disagrees. Plaintiffs correctly assert that the FMLA imposes specific notice requirements  
18 on employers. E.g., 29 U.S.C. § 2619(a); 29 C.F.R. § 825.300. Ms. Washburn’s

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19 <sup>9</sup> To be clear, the Court does have concerns regarding whether Ms. Washburn will be  
20 able to show that she sustained any recoverable damages. As the Supreme Court has explained,  
21 “§ 2617 provides no relief unless the employee has been prejudiced by [a] violation.” Ragsdale,  
22 535 U.S. at 88. And the FMLA, by its terms, allows an aggrieved employee to recover only  
23 actual monetary losses: “for compensation and benefits lost ‘by reason of the violation,’  
24 § 2617(a)(1)(A)(i)(I), for other monetary losses sustained ‘as a direct result of the violation,’  
25 § 2617(a)(1)(A)(i)(II), and for ‘appropriate’ equitable relief, including employment,  
26 reinstatement, and promotion, § 2617(a)(1)(B).” Ragsdale, 535 U.S. at 88. Claims for intangible  
losses like emotional distress, Opp. (Dkt. # 64) at 16, are not recoverable. Farrell v. Tri-Cnty.  
Metro. Transp. Dist. of Or., 530 F.3d 1023, 1025 (9th Cir. 2008). And even under the best of  
circumstances, such “other losses” are capped at “a sum equal to 12 weeks . . . of wages or  
salary.” § 2617(a)(1)(A)(i)(II).

1 allegations regarding Defendants' failure to notify her of her rights prior to January  
2 2010, e.g., Dkt. # 68 at ¶ 21, are sufficient to raise a triable issue of fact as to whether  
3 these requirements were met.<sup>10</sup>

4 The same is true of Ms. Washburn's complaints that Defendants "failed to  
5 investigate or enter the collaborative process to determine what amount of time [she]  
6 needed for FMLA leave" and "failed to allow or provide her leave when requested"—at  
7 least to the extent Defendants allegedly failed "to initiate a procedure to determine  
8 whether she qualified for FMLA leave" prior to January 2010. Compare, e.g., id., with  
9 Liu, 347 F.3d at 1135. As Liu makes clear, once an employee provides "notice sufficient  
10 to make the employer aware that the employee needs FMLA-qualifying leave," 29  
11 C.F.R. 825.302(c), it is the employer's responsibility "to initiate a procedure" to  
12 determine whether "FMLA leave is appropriate, to inquire as to specific facts to make  
13 that determination, and to inform the employee of his or her entitlements." 347 F.3d at  
14 1134–35. And Ms. Washburn has stated that no inquiry was undertaken and no FMLA  
15 leave was given prior to January 2010. E.g., Dkt. # 68 at ¶¶ 20–21; see Dkt. # 64 at 14  
16 ("Defendants' failure to acknowledge FMLA rights until January 2010 was  
17 interference."). Thus, even though the Court agrees that Ms. Washburn does not appear  
18 to have incurred any "actual monetary losses" as a result of this alleged interference, see  
19 Dkt. # 69-2 at 24 ("They did not deny me [any leave] I requested off."), it may still  
20 amount to a technical violation. See Liu, 347 F.3d at 1135.

21 The Court next considers her "retaliation" claim, which, as explained in

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22 <sup>10</sup> The Court notes that the Act and its implementing regulations appear to conflict as to  
23 whether every notice requirement gives right to a private cause of action. For example, the Act  
24 allows employees to bring a civil action for violations of § 2615 only. § 2617(a). And the  
25 "posting" notice requirement is contained at § 2619(a). See also § 2619(b) (providing a civil  
26 penalty for a violation of § 2619(a)). As a result, the regulation's inclusion of this requirement  
as a form of "interference with, restraint, or denial of the exercise of an employee's FMLA  
rights," § 825.300(e), appears to contravene the Act itself.

1 Bachelor, is really a § 2615(a)(1) interference claim. 259 F.3d at 1124. At the outset,  
 2 the Court finds that nearly all of Ms. Washburn’s complaints regarding her co-workers  
 3 alleged conduct do not qualify as interference. See Brooks v. City of San Mateo, 229  
 4 F.3d 917, 928–29 (9th Cir. 2000) (citation omitted) (Title VII); see Ray v. Henderson,  
 5 217 F.3d 1234, 1241 (9th Cir. 2000) (Title VII). Simply put, being “shunned,” being  
 6 glared at, and having a file cabinet door “slammed” in one’s presence on a single  
 7 occasion is not “sufficiently severe or pervasive to alter the conditions of the victim’s  
 8 employment and create an abusive working environment.” Ray, 217 F.3d at 1245; see  
 9 Brown v. City of Tucson, 336 F.3d 1181, 1193 (9th Cir. 2003) (“We are quite convinced  
 10 that, even assuming their truth, some of Brown’s allegations do not constitute a violation  
 11 of § 503(b)—specifically her assertions that Holliday talked on the phone with Richards  
 12 about her; told her that she was ‘sloughing off’ and ‘goofing off’; and informed her that  
 13 other members of the unit were complaining about her early departures and long  
 14 lunches.”); Brooks, 229 F.3d at 928–29 (holding that the plaintiff’s claims that “she  
 15 returned to a very different workplace than the one she had left”—“that her coworkers  
 16 shunned her” and “the males in the office refused to speak to her about anything other  
 17 than work”—was not actionable). Defendants’ repeated requests that Ms. Washburn  
 18 step down from her position are a different matter, however. See Brown, 336 F.3d at  
 19 1193. Because such conduct has the effect of “discouraging an employee from using  
 20 [her] leave,” 29 C.F.R. § 825.220(b); Brown, 336 F.3d at 1193, the Court will allow that  
 21 aspect of her “retaliation” interference claim to proceed to trial.

22 Finally, the Court reaches Ms. Washburn’s last FMLA contention: that  
 23 Defendants “failed to return her job to her when she returned from leave.” Dkt. # 42 at ¶  
 24 3.4. As framed in her response, this contention actually encompasses two alleged  
 25 violations—that Defendants allegedly “fired” her after she exhausted her FMLA leave  
 26 time, Dkt. # 64 at 15, and that they “did not provide [her] Extended Personal Leave as

1 promised in McDonald's [sic] January 6, 2010 leave flyer," id. at 16. The Court finds  
2 that Defendants are entitled to judgment as a matter of law as to each.

3 Notably, the Court agrees that each claim, in the abstract, is actionable. "The  
4 right to reinstatement guaranteed by 29 U.S.C. § 2614(a)(1) is the linchpin of the  
5 entitlement theory because 'the FMLA does not provide leave for leave's sake, but  
6 instead provides leave with an expectation that an employee will return to work after the  
7 leave ends.'" Sanders, 657 F.3d at 778 (citations and some internal quotation marks  
8 omitted). The difficulty in this case is that Ms. Washburn has not presented any  
9 evidence that Defendants failed to reinstate her. See id. ("[E]vidence that an employer  
10 failed to reinstate an employee who was out on FMLA leave to her original (or an  
11 equivalent) position establishes a prima facie denial of the employee's FMLA rights.").  
12 To the contrary, each time Ms. Washburn returned to work prior to January 2010, she  
13 was reinstated to her position. And, it is beyond dispute that after Ms. Washburn  
14 exhausted her FMLA leave in March 2010, Defendants again offered to reinstate her to  
15 her prior position. Dkt. # 68 at ¶ 64; see Dkt. # 69-26 at 9 (informing Ms. Washburn that  
16 her leave had expired and that she should contact her "Store Manager *immediately* in  
17 order to arrange [her] return date." (emphasis in original)); Dkt. # 69-2 at 21–22; Dkt. #  
18 69-24 (noting that Ms. Washburn had declined to return to the Tacoma store).

19 It is equally undisputed that, rather than agreeing to return, Ms. Washburn told  
20 Defendant Gymboree that she would not return to her old position—that she would only  
21 return to a different position. E.g., Dkt. # 69-2 at 22 ("I did tell [Ms. Macdonald] that I  
22 would not return to the Tacoma store, that I wanted to go to a different location."). And  
23 though she may have had very good personal and medical reasons for that decision, e.g.,  
24 Dkt. # 68 at ¶ 64 ("I very clearly told Gymboree (through McDonald [sic]) that my  
25 doctors would not release me to work at the Tacoma Mall store . . . ."), those reasons did  
26 not impose an FMLA obligation on Defendants. Sanders, 657 F.3d at 778. "The FMLA

1 is clear on this point: ‘Nothing in this section shall be construed to entitle any restored  
 2 employee to . . . any right, benefit, or position of employment other than any right,  
 3 benefit or position to which the employee would have been entitled had the employee not  
 4 taken the leave.’ 29 U.S.C. § 2614(a)(3)(B). And the regulations are even clearer: “If  
 5 the employee is unable to perform an essential function of the position because of a  
 6 physical or mental condition, including the continuation of a serious health condition or  
 7 an injury or illness . . . , the employee has no right to restoration to another position  
 8 under the FMLA.” 29 C.F.R. § 825.216(c) (emphasis added). Accordingly, the Court  
 9 GRANTS Defendants summary judgment as to this aspect of Ms. Washburn’s FMLA  
 10 interference claim. See id.

11 The second aspect of Ms. Washburn’s failure to reinstate claim does not fare any  
 12 better. Again, the Court finds no fault with the legal premise. The Department of  
 13 Labor’s regulations do require an employer to “observe any employment benefit  
 14 program or plan that provides greater family or medical leave rights to employees than  
 15 the rights established by the FMLA.” 29 C.F.R. § 825.700. The difficulty is that the  
 16 facts do not support Ms. Washburn’s conclusory, self-serving contention that Defendants  
 17 promised such leave “in the paperwork sent by [Ms. Macdonald].” Compare Dkt. # 68 at  
 18 ¶ 76, with FTC v. Publ’g Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1997) (“A  
 19 conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is  
 20 insufficient to create a genuine issue of material fact.”). As is plain from even a cursory  
 21 review of that paperwork, no promise of extended leave was made; the paperwork  
 22 merely informed Ms. Washburn of the availability of additional leave if requested,  
 23 documented, and approved. Dkt. # 69-26 at 5. As the document states: “[I]f you are on  
 24 an approved disability leave due to your own serious health condition, you may request  
 25 additional time off . . . up to 7 months of leave in total, including the leave time granted  
 26 under FMLA or any state law.” Id. (first emphasis in original). But as it makes clear,



1 “[i]n order to request any additional time, you must submit documentation from your  
2 healthcare provider stating your dates of disability.” Id.

3 Moreover, in addition to not serving as any sort of promise or guarantee, the  
4 paperwork demonstrates that Ms. Washburn failed to take the appropriate steps to apply  
5 for such leave. Even were the Court to credit her “clear statements that [she] wanted to  
6 continue to work,” Dkt. # 68 at ¶ 76, as a request for extended leave, the very document  
7 on which she relies makes clear that, “to make a request,” an employee must provide  
8 sufficient medical documentation to justify the time requested. Dkt. # 69-26 at 5. And,  
9 as Ms. Washburn has repeatedly admitted, she did not provide Defendants with any  
10 medical documentation to justify even FMLA leave beyond February 12, 2010, much  
11 less any purported request for extended leave. E.g., Dkt. # 69-2 at 24 (“Q: But you  
12 didn’t provide any further notes covering the period after February 12th? A: No, I did  
13 not.”). Accordingly, Defendants could not have violated § 825.700 by failing to allow  
14 her extended leave, and the Court GRANTS Defendants’ summary judgment as to this  
15 aspect of her FMLA interference claim as well.

16 In sum then, the Court GRANTS Defendants’ motion as to Ms. Washburn’s  
17 claims that they violated the FMLA by failing “to return her job to her when she returned  
18 from leave.” It also GRANTS Defendants’ motion as to the alleged “retaliation”  
19 interference, except to the extent she alleges she was threatened with demotion. Her  
20 remaining FMLA claims contain issues of fact that must be resolved at trial.

## 21 **B. Washington’s Family Leave Act (“WFLA”)**

22 Ms. Washburn’s claims under the WFLA do not require much discussion. See  
23 Dkt. # 42 at ¶ 3.3. By and large, they are identical to her FMLA claims. Compare id.,  
24 with id. at ¶ 3.4. There is good reason for the similarity. As other courts have  
25 recognized, e.g., Kopp v. Reardan/Edwall Sch. Dist. No. 009, No. CV-07-216-LRS,  
2009 WL 774122, at \*8 n.4 (E.D. Wash. Mar. 19, 2009), the WFLA mirrors the

1 provisions of the FMLA. And as RCW 49.78.410 provides, “This chapter must be  
2 construed to the extent possible in a manner that is consistent with similar provisions, if  
3 any, of the federal family and medical leave act of 1993 (Act Feb. 5, 1993, P.L. 103-3,  
4 107 Stat. 6), and that gives consideration to the rules, precedents, and practices of the  
5 federal department of labor relevant to the federal act.”

6 As a result, the Court’s discussion of Ms. Washburn’s FMLA claims applies  
7 equally to the merit of her WFLA claims. The Court thus GRANTS Defendants’ motion  
8 as to her claims that Defendants violated the WFLA by failing “to return her job to her  
9 when she returned from leave.” It also GRANTS Defendants’ motion as to her alleged  
10 “retaliation” interference claim, except to the extent Ms. Washburn alleges she was  
11 threatened with demotion. Otherwise, for the reasons stated, Ms. Washburn’s remaining  
12 WFLA claims will proceed to trial.

### 13 **C. Americans with Disabilities Act**

14 “The ADA prohibits discrimination ‘against a qualified individual on the basis of  
15 disability in regard to . . . job training[] and other terms, conditions, and privileges of  
16 employment.’” U.S. E.E.O.C. v. UPS Supply Chain Solutions, 620 F.3d 1103, 1110 (9th  
17 Cir. 2010) (quoting 42 U.S.C. § 12112(a)). An employer discriminates against a  
18 qualified individual with a disability<sup>11</sup> by “not making reasonable accommodations to the  
19 known physical or mental limitations of an otherwise qualified individual with a  
20 disability who is an applicant or employee, unless [the employer] can demonstrate that  
21 the accommodation would impose an undue hardship on the operation of the business of  
22 [the employer].” § 12112(b)(5). And the ADA also precludes an employer from

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23 <sup>11</sup> “The term ‘qualified individual with a disability’ means an individual with a disability  
24 who, with or without reasonable accommodation, can perform the essential functions of the  
25 employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). In their  
26 motion, Defendants do not dispute that Ms. Washburn is such an individual.

1 retaliating against any individual who “has opposed any act or practice made unlawful  
2 by this chapter . . . or participated in any manner in an investigation,” 42 U.S.C. §  
3 12203(b), and makes it unlawful for an employer to “coerce, intimidate, threaten, or  
4 interfere with any individual in the exercise or enjoyment of, or on account of his or her  
5 having exercised or enjoyed,” his or her ADA rights, § 12203(b).

6 In this case, Ms. Washburn has asserted that Defendant Gymboree<sup>12</sup> violated these  
7 protections “by failing to provide plaintiff proper notice of her ADA rights, failing to  
8 investigate or enter the collaborative process to determine whether her physical disability  
9 could be accommodated, failing to provide her reasonable accommodation, harassing her  
10 and subjecting her to a hostile work environment because of her Disability, retaliating  
11 against her when she requested her ADA rights, and ultimately terminating her because  
12 of her disability and attempt to exercise her ADA rights.” Dkt. # 42 at ¶ 3.4. In its  
13 motion, Gymboree contends that “Plaintiff cannot establish any of these claims” and  
14 challenges Ms. Washburn’s assertions that it failed to reasonably accommodate her  
15 disability, harassed her, and ultimately retaliated against her. Dkt. # 52 at 10–18. In  
16 response, Ms. Washburn defends only three aspects of their claim: that Defendant failed  
17 to reasonably accommodate her disability, that they harassed her and subjected her to a  
18 hostile work environment on account of her disability, and that they retaliated against her  
19 by ultimately firing her. Dkt. # 64 at 17–23. The Court therefore limits its inquiry to  
20 these disputed claims. Jenkins v. Cnty. of Riverside, 398 F.3d 1093, 1095 n.4 (9th Cir.  
21 2005) (“Jenkins abandoned her other two claims by not raising them in opposition to the  
22 County’s motion for summary judgment.”); USA Petroleum Co. v. Atl. Richfield Co., 13

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23 <sup>12</sup> Ms. Washburn concedes that Defendants Anyan and Rackley are not liable under the  
24 ADA. Dkt. # 64 at 23 (citing Walsh v. Nev. Dept. of Human Res., 471 F.3d 1033, 1038 (9th Cir.  
25 2006) (“The district court was correct when it held that individual defendants cannot be held  
26 personally liable for violations of the ADA.”)). Accordingly, the Court dismisses her ADA  
claims against each.

1 F.3d 1276, 1284 (9th Cir. 1994) (“It is a general rule that a party cannot revisit theories  
2 that it raises but abandons at summary judgment.”).

### 3 **1. Reasonable Accommodation**

4 The Court turns first to Ms. Washburn’s accommodation-related claim, which  
5 encompasses her allegations that Gymboree both failed to properly engage in an  
6 interactive process and failed to allow her at least three reasonable accommodations:  
7 leave without harassment, additional leave after she exhausted her FMLA leave in 2010,  
8 and transfer. At the outset, the Court declines Ms. Washburn’s invitation to evaluate  
9 Defendant’s process in the abstract. As the Ninth Circuit has explained, the process is  
10 the means to an end—the provision of a reasonable accommodation. Zivkovic v. S. Cal.  
11 Edison Co., 302 F.3d 1080, 1089 (9th Cir. 2002) (“[O]nce an employee requests an  
12 accommodation or an employer recognizes the employee needs an accommodation but  
13 the employee cannot request it because of a disability, the employer must engage in an  
14 interactive process with the employee to determine the appropriate reasonable  
15 accommodation.” (emphasis added)). It is not an end in and of itself. See id.; Humphrey  
16 v. Mem’l Hosps. Ass’n, 239 F.3d 1128, 1138 (9th Cir. 2001) (“Given MHA’s failure to  
17 engage in the interactive process, liability is appropriate if a reasonable accommodation  
18 without undue hardship to the employer would otherwise have been possible.”).

19 Moreover, it is not a one-sided obligation. Both employee and employer must  
20 participate in an ongoing dialogue that “‘fosters the framework of cooperative  
21 problem-solving contemplated by the ADA’ because it ‘encourag[es] employers to seek  
22 to find accommodations that really work,’ and because it ‘avoid[s] the creation of a  
23 perverse incentive for employees to request the most drastic and burdensome  
24 accommodation possible out of fear that a lesser accommodation might be ineffective.’”  
25 UPS Supply, 620 F.3d at 1111 (quoting Humphrey, 239 F.3d at 1138); see Zivkovic, 302  
26 F.3d at 1089 (“The interactive process requires: (1) direct communication between the

1 employer and employee to explore in good faith the possible accommodations; (2)  
2 consideration of the employee's request; and (3) offering an accommodation that is  
3 reasonable and effective."'). Accordingly, the Court will evaluate Defendant's efforts  
4 both in relation to each of the accommodations Ms. Washburn now proposes and in  
5 relation to her own actions.

6 The Court starts with her first proposed accommodation: leave without  
7 harassment. And the Court finds that, at least to the extent that Ms. Washburn asserts  
8 that she was threatened with demotion and/or repeatedly urged to step down from her  
9 position, Plaintiffs have an actionable claim. Brown, 336 F.3d at 1193; see also Brooks,  
10 229 F.3d at 928–29. As the Ninth Circuit concluded in Brown, "We are quite convinced  
11 that, even assuming their truth, some of Brown's allegations do not constitute a violation  
12 of § 503(b)—specifically her assertions that Holliday talked on the phone with Richards  
13 about her; told her that she was "sloughing off" and "goofing off"; and informed her that  
14 other members of the unit were complaining about her early departures and long lunches.  
15 We are equally confident that other allegations—most notably Holliday's demands that  
16 Brown stop taking her medications and perform night-time call-out or face demotion or  
17 forced retirement—do constitute actionable threats because Brown has alleged that she  
18 has suffered short-term memory problems and felt extremely stressed, harassed, and  
19 pressured by Holliday." 336 F.3d at 1193 (emphasis added). This delineation controls.

20 Ms. Washburn's second proposed accommodation does not fare as well. Most  
21 notably, she has not made any showing that "more time off" would have served as a  
22 reasonable accommodation or that Defendant "bears responsibility for the breakdown  
23 in' the interactive process" that resulted in her failure to receive that newly proposed  
24 accommodation. See Zivkovic, 302 F.3d at 1089 (citation and internal quotation marks  
25 omitted). To the contrary, when Ms. Macdonald contacted Ms. Washburn in March  
26 about returning to work, Ms. Washburn told her that the problem was not one of time; it

1 was one of location. E.g., Dkt. # 68 at ¶ 64. As she states: “I very clearly told  
2 Gymboree (through McDonald [sic]) that my doctors would not release me to work at  
3 the Tacoma Mall store but that they would provide a written release to work at a  
4 different store.” Id. (emphasis in original). And as her own doctor explains, “Had I been  
5 asked by Gymboree to participate and assist in a collaborative process . . . [m]y  
6 recommendation would have been that simply allowing Kerry time off f[rom] work  
7 because of her MS was not enough.” Dkt. # 66 at ¶ 5.

8 Moreover, as previously discussed, it is undisputed that Defendant had already  
9 made Ms. Washburn aware of the availability of extended leave. E.g., Dkt. # 69-26 at 5.  
10 She only had to provide Defendant with the appropriate medical documentation to  
11 support her need for additional time off, id., a requirement specifically endorsed by the  
12 Equal Employment Opportunity Commission (“EEOC”). Dkt. # 69-49 at 6–7 (EEOC  
13 Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the  
14 Americans with Disabilities Act) (“When the disability and/or the need for  
15 accommodation is not obvious, the employer may ask the individual for reasonable  
16 documentation about his/her disability and functional limitations.”); id. at 8 (noting that  
17 an employer may ask an employee to provide documentation to support the need for a  
18 specific accommodation even if she may not be asked for additional proof regarding an  
19 already-established disability). And as the EEOC makes clear, “[i]f an individual’s . . .  
20 need for reasonable accommodation is not obvious, and s/he refuses to provide the  
21 reasonable documentation requested by the employer, then s/he is not entitled to  
22 reasonable accommodation.” Id. at 7–8. Accordingly, the Court finds as a matter of law  
23 that Gymboree cannot be blamed for not according Ms. Washburn an accommodation  
24 she expressly and repeatedly denied needing and, alternatively, for which she never  
25 provided the necessary documentation after being informed of its availability.

26 Finally, the Court finds that Ms. Washburn’s third proposed accommodation,

1 transfer, is also largely deficient. Notably, transfer is not, in and of itself, an  
2 unreasonable accommodation. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 398–99  
3 (2002). Section 12111(9)(B) specifically lists “reassignment to a vacant position” as an  
4 example of a reasonable accommodation. Accord Barnett, 535 U.S. at 398–99. The  
5 question in this case is whether any “vacant” positions existed. In support of their  
6 argument that they did, Ms. Washburn first contends that there was a nearly limitless  
7 supply of “vacant positions” because Gymboree employees work “at will” and  
8 Gymboree thus could have forced any employee to swap stores with her. Dkt. # 64 at  
9 20–22. The Court disagrees with this position. As the Supreme Court explained in  
10 Barnett, “Nothing in the Act . . . suggests that Congress intended the word ‘vacant’ to  
11 have a specialized meaning.” 535 U.S. at 398–99. And, “in ordinary English,” “vacant”  
12 means “not occupied by an incumbent.” Merriam-Webster Dictionary,  
13 <http://www.merriam-webster.com/dictionary/vacant>; The Free Dictionary,  
14 <http://www.thefreedictionary.com/vacant> (“containing nothing; empty” or “being  
15 without an incumbent or occupant; unfilled”). Accordingly, a position that is in fact  
16 occupied by another person is, by definition, not “vacant.” And the Court finds no basis  
17 for concluding that the ADA contemplates requiring an employer to bump an employee  
18 from a position he or she already holds to give that position to a disabled employee. See  
19 Barnett, 535 U.S. at 399 (“The position in this case was held, at the time of suit, by  
20 Barnett, not by some other worker; and that position, under the U.S. Airways seniority  
system, became an ‘open’ one.” (emphasis added)).

21 Nevertheless, the Court cannot yet dismiss the claim because there remains a  
22 factual question as to whether there were any vacant positions at or around the time that  
23 Ms. Washburn informed Gymboree that she needed to transfer in order to be medically  
24 cleared to return to work. For example, Ms. Washburn represents that she informed  
25 Gymboree of her need on or about March 10, 2010, Dkt. # 68 at ¶ 64, and continued to



1 communicate with Gymboree through April 14, 2010, about that possibility, id. at ¶ 72.  
2 And Ms. Washburn has provided evidence that, during this time frame, Defendant filled  
3 several positions in several stores in the area. See Dkt. # 70. As a result, assuming she  
4 can convince the trier of fact that she did indicate a desire to transfer to any store, and  
5 not just store # 325, which did not have an opening, id., and assuming that she can  
6 further prove that transfer would have been a reasonable accommodation under the  
7 circumstances, Ms. Washburn may have a claim.

8 In sum then, the Court GRANTS Defendant Gymboree's motion as to Ms.  
9 Washburn's ADA reasonable accommodation claims IN PART. It finds that Defendant  
10 is entitled to judgment as a matter of law as to Ms. Washburn's claims that her shunning  
11 by her co-workers gave rise to an actionable ADA claim, that Gymboree failed to  
12 reasonably accommodate her disability by allowing her additional time off in 2010, and  
13 that Gymboree should have displaced other employees to allow her to transfer. The  
14 Court will need to resolve her remaining accommodation claims at trial.

## 15 **2. Harassment**

16 The Court turns next to Ms. Washburn's harassment claim—that, as stated  
17 previously, her treatment by her co-workers and her managers, Ms. Anyan and Ms.  
18 Rackley, constituted a hostile work environment.

19 The Court notes at the outset that the Ninth Circuit has yet to recognize a hostile  
20 work environment ADA claim. Brown, 336 F.3d at 1189–90. Instead, as discussed  
21 supra, under nearly identical circumstances, the Ninth Circuit concluded that a plaintiff's  
22 claim that “other members of the unit were complaining about her early departures and  
23 long lunches” was not actionable under § 12203(b), whereas her claim that her manager  
24 demanded she either forego her accommodations “or face demotion” were. Id. at 1192;  
25 see also Brooks, 229 F.3d at 928–29. Accordingly, the Court again follows Brown's  
26 example. It GRANTS Defendant's motion as to Ms. Washburn's claims that her

1 shunning by her co-workers gave rise to an actionable ADA claim but allows her  
2 § 12203(b) demotion-related interference claim to proceed to trial.

### 3 **3. Retaliation**

4 Finally, the Court reaches Ms. Washburn's last ADA claim, which, as framed in  
5 her motion, is premised on her assertion that she was terminated because of her attempts  
6 to exercise her ADA rights and/or was constructively terminated by the harassment she  
7 allegedly endured. Dkt. # 64 at 18.

8 Again, the Court finds the basis of Plaintiffs' claim to be duplicative of her other  
9 ADA claims. Accordingly, it relies on its prior discussions of those contentions. To the  
10 extent Ms. Washburn relies on her extended leave contention, the Court finds it deficient  
11 as a matter of law. To the extent she relies on the possibility of transfer or managerial  
12 interference, the Court will allow the claim to proceed to trial as a § 12203(b) interference  
13 claim. See Brown, 336 F.3d at 1189–90; Bachelder, 259 F.3d at 1124 (distinguishing  
14 actual retaliation claims from interference claims).

### 15 **D. Washington's Law Against Discrimination ("WLAD")**

16 Defendants next challenge the legal merit of Ms. Washburn's WLAD claims,  
17 which essentially mirror her ADA claims.

18 In their motion, Defendants contend that Washington's treatment of WLAD claims  
19 tracks the Ninth Circuit's treatment of ADA claims and thus rely on the same arguments  
20 Defendant Gymboree raised in contesting Ms. Washburn's ADA contentions. See Dkt. #  
21 52 at 10. Ms. Washburn does not challenge this assertion, other than to argue that the  
22 WLAD, unlike the ADA, extends personal liability to individual supervisors as well. The  
23 Court agrees with this point. See Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349,  
24 361–62 (2001) ("The plain meaning of RCW 49.60.040(3), by its very terms,  
25 encompasses individual supervisors and managers who discriminate in employment.").

26 Accordingly then, for the reasons explained in the Court's discussion of Ms.

1 Washburn's ADA claims, the Court GRANTS Defendants' motion as to her WLAD  
 2 claims IN PART. It finds that Defendants are entitled to judgment as a matter of law on  
 3 Ms. Washburn's claims that her shunning by her co-workers gave rise to an actionable  
 4 WLAD claim, that Gymboree failed to reasonably accommodate her disability by  
 5 allowing her additional time off in 2010, and that Gymboree should have displaced other  
 6 employees to allow her to transfer. The Court finds that genuine issues of material fact  
 7 exist as to the remaining accommodation, harassment, and retaliation claims and therefore  
 8 DENIES the motion as to each.

#### 9 **E. Willful Failure to Pay Wages**

10 Ms. Washburn's fifth claim is for Defendants' alleged "willful failure to pay . . .  
 11 her wages in violation of RCW 49.48.030 and RCW 49.52.070." See Dkt. # 42 at ¶ 3.5.

12 In their motion, Defendants' challenge this claim, categorizing it as a claim for  
 13 back wages that "should be dismissed as well." Dkt. # 52 at 21. In response, Ms.  
 14 Washburn says nothing. Her response is devoid of any mention of either RCW 49.48.030  
 15 or RCW 49.52.070, much less any defense of the claim. See Dkt. # 64. And though the  
 16 Court could treat counsel's failure as an admission that the claim lacks merit, Jenkins, 398  
 17 F.3d at 1095 n.4; USA Petroleum, 13 F.3d at 1284, it has instead conducted its own  
 18 inquiry into the possible merit of Ms. Washburn's claim.

19 As is relevant, RCW 49.48.030 provides: "In any action in which any person is  
 20 successful in recovering judgment for wages or salary owed to him or her, reasonable  
 21 attorney's fees, in an amount to be determined by the court, shall be assessed against said  
 22 employer or former employer . . . ." Washington courts have interpreted the statute  
 23 broadly, finding that it "provides reasonable attorney's fees in any action in which a  
 24 person is successful in recovering judgment for wages or salary owed," including  
 25 "situations in which an award is made not of wages actually worked for, but rather, for  
 26 moneys due 'by reason of employment.'" Hayes v. Trulock, 51 Wn. App. 795, 836

(1988) (emphasis in original); see Gaglidari v. Denny's Rests., Inc., 117 Wn.2d 426, 448–49 (1991). Thus, because there remains a triable issue of fact as to whether Ms. Washburn is owed wages as a result of Defendants' conduct, the Court must DENY Defendants' motion as to RCW 49.48.030.

Turning next to RCW 49.52.070, the Court notes that the statute allows an aggrieved employee to collect twice the amount of the wages unlawfully and wilfully withheld by an employer "by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees." See also RCW 49.52.070(2). And Washington courts have found the scope of covered "wages" to be coextensive to those covered by RCW 49.48.030, with at least one relevant distinction: RCW 49.48.070 does not apply "if the employer has a bona fide dispute as to the obligation to pay." Allstot v. Edwards, 114 Wn. App. 625, 633 (2002) (defining a "bona fide dispute" as one in which it "is fairly debatable . . . whether all or a portion of the wages must be paid"); accord Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 166 (1998). In any case, because there exists a question of fact as to whether Defendants owe Ms. Washburn any unpaid wages, and because "the issue of whether an employer acts 'willfully' for purposes of RCW 49.52.070 is a question of fact," Schilling, 136 Wn.2d at 160, that is also plainly in dispute, the Court DENIES Defendants' motion as to RCW 49.52.070 as well.

#### **F. Defamation and False Light**

The Court next considers Ms. Washburn's claim that Ms. Rackley defamed her and portrayed her in a false light when she told Defendant Gymboree:

. . . I called Kerry 2 times and left a message both times offering her the opportunity to transfer to either 325 [the Gymboree Puyallup store] or 5103 [the Gymboree store in the Auburn Supermall] as a sales associate, but explained that we did not have open SL [Sales Lead] or AM [Assistant Manager] position at these locations. I did not receive a response to the message I left.

Dkt. # 52 at 21 (quoting Dkt. # 31 at 6–7 (e-mail from Ms. Rackley to Mr. Shanahan)).

1 The Court also considers Ms. Washburn's claim that Defendant Gymboree is vicariously  
 2 liable for Ms. Rackley's alleged torts, and that Gymboree committed an independent tort  
 3 when it repeated Ms. Rackley's account to Washington's Human Rights Commission in its  
 4 responses to Ms. Washburn's complaint. Dkt. # 64 at 24–25; see Dkt. # 42 at ¶ 3.6.<sup>13</sup>

5 The Court first considers whether the statement is defamatory. “Defamation is  
 6 concerned with compensating the injured party for damage to reputation.” Corey v. Pierce  
 7 Cnty., 154 Wn. App. 752, 762 (2010) (citing Eastwood v. Cascade Broad. Co., 106 Wn.2d  
 8 466, 471 (1986)). It “requires that a plaintiff prove falsity, an unprivileged  
 9 communication, fault, and damages.” Id. (citing Mohr v. Grant, 153 Wn.2d 812, 822  
 10 (2005)). Notably, though, “[b]efore the truth or falsity of an allegedly defamatory  
 11 statement can be assessed, a plaintiff must prove that the words constituted a statement of  
 12 fact, not an opinion.” Robel v. Roundup Corp., 148 Wn.2d 35, 55 (2002). And, for  
 13 obvious reasons, the statement must also be defamatory. Right–Price Recreation LLC v.  
 14 Connells Prairie Cmty. Council, 146 Wn.2d 370, 382 (2002); Ernst Home Ctr., Inc. v.  
 15 United Food & Commercial Workers Int’l Union, Local 1001, 77 Wn. App. 33, 40 (1995).  
 16 As stated in Ernst, “our Supreme Court has indicated that not every misstatement of fact is  
 17 actionable.” 77 Wn. App. at 40 (quoting Mark v. Seattle Times, 96 Wn.2d 473, 493  
 18 (1981)). “Rather, it must be apparent that the false statement or communication presents a  
 19 substantial danger to the plaintiff’s personal or business reputation.” Id. (same). It must  
 20 tend to so “harm the reputation of another as to lower him in the estimation of the  
 21 community or to deter third persons from associating or dealing with him.” Right–Price,  
 22 146 Wn.2d at 382 (quoting Restatement (Second) of Torts § 559 (1977)). “Accordingly,

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23 <sup>13</sup> In their response, Ms. Washburn does not defend her allegation that Ms. Rackley  
 24 defamed her by stating that she “had made no specific complaint of harassment.” Dkt. # 64 at  
 25 24–25. Accordingly, she has waived the contention. Compare Jenkins, 398 F.3d at 1095 n.4,  
 and USA Petroleum, 13 F.3d at 1284, with id., and Dkt. # 42 at ¶ 3.6. The Court further finds  
 that it fails on its merits for the reasons discussed in this section.

1 the [C]ourt must initially decide, as a matter of law, whether [a] statement or  
2 communication is capable of a defamatory meaning.” Ernst, 77 Wn. App. at 40.

3 In this case, Defendants challenge Ms. Washburn’s claim on a variety of grounds.  
4 Dkt. # 52 at 21–23. Ultimately, however, the Court goes no further than the initial step of  
5 evaluating the nature of the statement itself, finding that the complained-of statement is  
6 non-defamatory as a matter of law. See Ernst, 77 Wn. App. at 40. Admittedly, as  
7 Defendants concede, the statement was false. That said, it was also, in and of itself, not  
8 harmful to Ms. Washburn’s reputation. It did not “expose [her] to hatred, ridicule or  
9 contempt.” Restatement (Second) of Torts § 559, cmt. b. It did not disparage her “by  
10 reflecting unfavorably upon h[er] personal morality or integrity or . . . consist of  
11 imputations which, while not affecting [her] personal reputation, tend[ed] to discredit h[er]  
12 financial standing in the community.” Id. And it certainly is not the kind of statement that  
13 would “deter third persons from associating [or dealing] with [her]. Id. at § 559, cmt. c.  
14 Simply put, the statement was false, and it was unfortunate, but it was not defamatory.

15 Ms. Washburn’s false light claim stands on slightly different footing. As  
16 Washington courts have explained, “[f]alse light differs from defamation in that it focuses  
17 on compensation for mental suffering, rather than reputation.” Corey, 154 Wn. App. at  
18 762; see Eastwood, 106 Wn.2d at 471 (“While all false light cases need not be defamation  
19 cases, all defamation cases are potentially false light cases.”). Thus, “[i]t is not . . .  
20 necessary to the action . . . that the plaintiff be defamed.” Restatement (Second) of Torts  
21 § 652E, cmt. b; see Eastwood, 106 Wn.2d at 470–71 n.8 (applying the Restatement  
22 formulation). “It is enough that [s]he is given unreasonable and highly objectionable  
23 publicity that attributes to h[er] characteristics, conduct or beliefs that are false, and so is  
24 placed before the public in a false position.” Restatement (Second) of Torts § 652E, cmt.  
25 b. Accordingly, “[a] false light claim arises when ‘someone publicizes a matter that places  
26 another in a false light if (a) the false light would be highly offensive to a reasonable

1 person and (b) the actor knew of or recklessly disregarded the falsity of the publication  
2 and the false light in which the other would be placed.” Corey, 154 Wn. App. at 762.

3 That said, the distinction between defamation and false light also cuts against Ms.  
4 Washburn. As explained in the Restatement, “[p]ublicity,’ as it is used in [the context of  
5 privacy torts like false light], differs from ‘publication,’ as that term is used in § 577 in  
6 connection with liability for defamation.” Restatement (Second) of Torts § 652D, cmt. a;  
7 see Restatement (Second) of Torts § 652E, cmt. a (“On what constitutes publicity and the  
8 publicity of application to a simple disclosure, see § 652D, Comment a, which is  
9 applicable to the rule stated here.”); accord Vande Hey v. Walla Walla Cmty. Hospice,  
10 142 Wn. App. 1033, at \*3 (2008) (noting Washington’s adherence to § 652D formulation).  
11 “‘Publication,’ in that sense, is a word of art, which includes any communication by the  
12 defendant to a third person.” Restatement (Second) of Torts § 652D, cmt. a. “‘Publicity,’  
13 on the other hand, means that the matter is made public, by communicating it to the public  
14 at large, or to so many persons that the matter must be regarded as substantially certain to  
15 become one of public knowledge.” Id. (emphasis added). “[C]ommunication to a single  
16 person or a small group does not qualify.” Fisher v. Dep’t of Health, 125 Wn. App. 869,  
17 879 (2005) (quoting § 652D); Herndon v. City of Everett, 113 Wn. App. 1031, at \*4  
18 (2002) (concluding that publication of a falsehood to seven individuals is insufficient,  
19 because the tort requires “publication must be ‘to a substantial number of people’”).

20 And in this case, while there may have been “publication,” there is no colorable  
21 evidence of “publicity.” Cf. Anderson, 477 U.S. at 249–50. Ms. Washburn asserts that  
22 Ms. Rackley relayed her inaccurate account of her actions to Mr. Shanahan and that  
23 Gymboree then relayed this same account to the Human Right’s Commission’s  
24 inquiry—nothing more. See Dkt. # 64 at 24 (“Kerry alleged both Rackley’s statement to  
25 Shanahan and Gymboree’s statement to the HRC are ‘publications.’”). Neither is a  
26 “communicati[on] . . . to the public at large, or to so many persons that the matter must be



1 regarded as substantially certain to become one of public knowledge.” See Restatement  
 2 (Second) of Torts § 652D, cmt. a. Rather, as in Vande, Ms. Rackley’s statement to Mr.  
 3 Shanahan was a non-public communication between employees. 142 Wn. App. 1033, at  
 4 \*3 (“Here, Ms. Vande Hey fails to show the statements were ‘publicized’ within the  
 5 meaning of an invasion of privacy claim. . . . Ms. York communicated solely with her  
 6 employees through an internal memo.”). And a claim on account of Gymboree’s repeating  
 7 of Ms. Rackley’s statement to a single Commission investigator, Dkt. # 68 at ¶ 78  
 8 (“Despite that, the investigator with the Human Rights Commission phoned me and told  
 9 me he was going to dismiss my complaint because Gymboree told him I was offered two  
 10 positions that I asked for and ignored the offers.”), is precluded by the black-letter rule  
 11 itself. Restatement (Second) of Torts § 652D, cmt. a; Fisher, 125 Wn. App. at 879.<sup>14</sup> The  
 12 audience was small and not public.

13 Accordingly, for the reasons stated, the Court GRANTS Defendants’ motion as to  
 14 Ms. Washburn’s defamation and false light claims.

### 15 **G. Loss of Consortium**

16 Finally, the Court finds that Plaintiff Michael Washburn has provided sufficient

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17 <sup>14</sup> Though not argued by Ms. Washburn, the Court has further considered whether the  
 18 fact that the Commission’s file ultimately “becomes a public record” is sufficient “publicity.”  
 19 See Washington State Human Rights Commission, *General*, FREQUENTLY ASKED QUESTIONS,  
 20 <http://www.hum.wa.gov/FAQ/FAQGeneral.html> (last visited August 27, 2012). The Court finds  
 21 that it is not. First, such republication would be imputed to the Commission and not Defendants.  
 22 See LaMon v. City of Westport, 44 Wn. App. 664, 668 (1986). Second, because the file is  
 23 obtainable only by specific request, Ms. Washburn would need to demonstrate actual access to  
 24 show even defamation-level publication—a showing they have not made. See id. (concluding  
 25 that the placement of a litigation file in the public library did not amount to “publication” for  
 26 purposes of defamation claim because “a person wishing to read the file, not on public display,  
 had to request it from the library staff” and the plaintiffs failed to show that anyone requested it).  
 And because she has not made that showing, she cannot demonstrate false light publicity. Id.  
 (“This conclusion that no publication occurred, dispositive of the LaMon’s defamation claim, is  
 also dispositive of their invasion of privacy claim based upon publicity that places them in a  
 false light. . . . Absent any publication, there can be no publicity.”).

evidence to raise a genuine issue of fact as to his loss of consortium claim. See Dkt. # 67. Accordingly, regardless of Ms. Washburn's conflicting evidence, Dkt. # 69-2 at 35; Dkt. # 68 at ¶¶ 82–83, the Court DENIES Defendants' motion as to this claim.

### III. CONCLUSION

For all of the foregoing reasons, the Court GRANTS Defendants' summary judgment motion (Dkt. # 52) IN PART. The Court GRANTS the motion as to Ms. Washburn's claims that Defendants violated the FMLA and its state-law counterpart by failing "to return her job to her when she returned from leave" and by retaliating against her for taking leave, except to the extent Plaintiffs allege Ms. Washburn was threatened with demotion. It also GRANTS Defendants' motion as to Ms. Washburn's ADA and WLAD claims to the extent she relies on allegations of mistreatment by co-workers, entitlement to extended leave, or a requirement that Gymboree displace other workers to accommodate Ms. Washburn. It also GRANTS Defendants' motion as to any remaining ADA claims against Ms. Anyan and Ms. Rackley.

Finally, the Court GRANTS Defendants' motion as to Ms. Washburn's defamation and false light claims. The Court DENIES the motion in all other respects.

DATED this 4th day of September, 2012.



Robert S. Lasnik  
United States District Judge